No. 75-808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ANTHONY M. NATELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In the petition filed on December 5, 1975, petitioner advised the Court that the conviction of his co-defendant, Joseph Scansaroli, had initially been reversed and then reinstated on the government's petition for rehearing, and that Scansaroli's petition for rehearing of the reinstatement was pending before the court of appeals (Petition, p. 5 & n. 2; Pet. App. A & C.) This supplemental brief is submitted pursuant to Supreme Court Rule 24(5) to advise the Court that on December 4, 1975, the court of appeals granted Scansaroli's

petition, vacated its opinion and order on the government's rehearing petition, and again reversed Scansaroli's conviction.* A copy of the opinion of the court of appeals is attached as Appendix A to this supplemental brief. The opinion was filed on December 4 but did not come to the attention of petitioner's counsel until after the petition had been printed for filing with this Court on December 5.

Although the December 4 opinion of the Court below leaves undisturbed the affirmance of petitioner's conviction, several features of that opinion are relevant to the contentions raised in part III of petitioner's Reasons For Granting The Writ. (Petition, p. 33). There, petitioner asserts that because the indictment contained, in a single count, two distinct specifications of alleged falsity in the proxy statement, the

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*The court of appeals had originally concluded that the evidence was insufficient to convict Scansaroli on the specification involving the Eastern contract and in its first opinion reversed his conviction, applying the rule that reversal is mandated "where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957). On the government's petition, the court then reinstated the conviction because of the alleged failure of Scansaroli's counsel to move in the trial court to withdraw the Eastern specification from the jury's consideration. The reinstatement was voided by the court's December 4 decision.

Petitioner, who also has urged that the government failed to prove the Eastern specification (Petition, p. 19, 43-44), did move for withdrawal of that specification, as the court below noted. (App. 5a, *infra.*)

Constitutional requirement of a unanimous jury verdict should have been implemented by jury instructions amplifying the usual admonition that the "verdict" must be unanimous. Had the specifications been contained in two difference counts, the jury would have been forced to come to grips with each specification and to convict only if unanimous on at least one discrete set of allegations. Because the trial court failed to instruct the jury that unanimity was required on at least one specification contained in the single count, however, petitioner was denied equivalent protection. In its opinion affirming petitioner's conviction, the court of appeals refused to insist on such an instruction, simply suggesting that because each specification was "dependent on particular evidence which is unrelated to the other," it would have been "sound practice" to have granted petitioner's request. (Pet. App. 27a.)

In its December 4 opinion, the court below again described the two specifications contained in the one count as presenting "two distinct incidents or fact patterns." (App. 3a, *infra.*) The court offered a suggestion that placing such specifications in separate counts "might well be the better practice in cases like this where the incidents charged as in violation of a statute are discrete." (App. 5a, *infra.*)

The court's characterization of the two specifications in the indictment as "distinct" and "discrete" supports petitioner's point that a juror's finding as to one specification in this case does not as a logical matter imply a similar finding as to the other, and that therefore agreement by all jurors on a particular evidentiary path to the verdict of guilty cannot reasonably be inferred. (Petition, p. 35.) The court of appeals acknowledged the hazards in any *post hoc*

attempt to reconstruct the jurors' deliberations in these circumstances. Any need to engage in speculation about the jurors' agreement can, of course, be avoided where the government follows the court's suggestion of splitting the specifications into separate counts or where the trial judge gives proper instructions of the type requested here. Neither approach was taken in this case, however.

It is clear from the opinion below (App. 4a-5a, *infra*) that it is a common practice for the government to place specifications constituting "distinct incidents" in the same count of an indictment, as occurred here. Since the court of appeals did not purport to outlaw that practice, even for prosecutions within the Second Circuit, it is all the more important for this Court to grant certiorari here and to hold that, whenever such specifications are joined in a single count, the Constitutional requirement of unanimity on the essential facts and elements of the offense requires explicit instructions of the type refused to petitioner.

Respectfully submitted.

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December 1975

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1035 & 1036—September Term, 1975.

(Decided December 4, 1975.)

Docket Nos. 75-1004, 75-1008

UNITED STATES OF AMERICA,
Appellee,

v.

ANTHONY M. NATELLI and JOSEPH SCANSAROLI,
Defendants-Appellants.

Before:

HAYS, MULLIGAN and GURFEIN,
Circuit Judges.

On SCANSAROLI's Petition for Rehearing

GURFEIN, *Circuit Judge:*

This matter comes before the panel again on Scansaroli's petition for rehearing pursuant to our grant of permission. On the original appeal we had reversed appellant's conviction and remanded for a new trial.[1]

The single count charging violation of 15 U.S.C. § 78ff(a) upon which he was convicted involved the making of a

1 This opinion assumes knowledge of our original opinion, —— F.2d ——, Slip Op. 5165 (July 28, 1975).

false proxy statement which specified two false items therein: the "footnote" and the "nine-months earnings statement." We held that there was insufficient evidence to convict Scansaroli on the latter specification. See main opinion, Docket Nos. 75-1004, 75-1008, slip op. 5165, 5184, decided July 28, 1975.

We then granted a rehearing on the government's petition and held that under an old doctrine in this circuit we were constrained to decide that the failure of appellant specifically to ask the trial court to withdraw one of two specifications in a single count on the ground that it was insufficiently proved precluded appellate consideration. *United States* v. *Mascuch*, 111 F.2d 602, 603 (2 Cir.), *cert. denied*, 311 U.S. 650 (1940); *United States* v. *Goldstein*, 168 F.2d 666, 671 (2 Cir. 1948).

We accordingly reversed ourselves on the decision to grant a new trial to Scansaroli. We now withdraw our opinion on rehearing and reconsider this difficult question of appealability *de novo*.

We start with the proposition that there are many criminal cases where the failure to object has resulted in affirmance under Rule 30 as applied in Rule 52(a). Appellant's rather strident cries that our decision against him is unprecedented is hardly impressive. Many convictions are denied appellate review for failure to call the alleged error to the attention of the trial court so as to enable it to consider correction before verdict. Otherwise appellate review would become a game of hindsight.

I

We recognize, nevertheless, that even under the *Mascuch-Goldstein* line of cases, a proper request to the trial court would save the point. See, *e.g.*, *United States* v. *Adcock*, 447 F.2d 1337, 1338-39 (2 Cir.), *cert. denied*, 404 U.S. 939

(1971);[2] *United States* v. *Pollak*, 474 F.2d 828 (2 Cir. 1973). And see also *Warszower* v. *United States*, 312 U.S. 342, 345 (1941).[3] As we indicated in our original opinion, that is because *Yates* v. *United States*, 354 U.S. 298, 311-12 (1957),[4] and *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931), can be read as covering the situation where a jury may have convicted on the very specification which is insufficiently proved to make out an offense.

That is true, especially, when the specifications in the single count relate to two distinct incidents or fact patterns, see *United States* v. *Guterma*, 281 F.2d 742, 747 (2 Cir.), *cert. denied*, 364 U.S. 871 (1960), rather than being merely a charge of alternate ways of violating a statute stated in the conjunctive. Cf. *United States* v. *Astolas*, 487 F.2d 275, 280 (2 Cir. 1973), *cert. denied*, 416 U.S. 955 (1974).

Assuming, as we have already in our original opinion, that reversal of the conviction of Scansaroli is required if counsel adequately raised the point below, we turn to the question of how much must be done by defense counsel to protect the record.

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2 In *Adcock*, we reversed a conviction which charged the making of a false statement in violation of 18 U.S.C. § 1001 where the count ultimately reversed contained three assignments of falsity, two of which were sufficiently supported by the evidence. The government conceded on appeal that a proper motion to strike had been made pursuant to the *Mascuch-Goldstein* rule, but argued that appellant should, in addition, have moved for a special verdict. We held in *Adcock* that a special verdict would have been improper and hence a motion for such a verdict was unnecessary.

3 There the defendant had moved to strike from the record or exclude from the consideration of the jury each of the four alleged false statements.

4 In *Yates* it is not clear what protective measures appellant had taken below. The Court of Appeals had noted that many motions had been made. 225 F.2d 146, 149 (9 Cir. 1955).

II

The Federal Rules of Criminal Procedure cast no light on the matter. Rule 29(a) simply provides for a motion for judgment of acquittal "of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." No provision is made for a motion to withdraw one of two specifications in a single count on the ground of insufficiency. There may be an implication in Rule 30 that the failure to object to a particular specification is fatal because it amounts to a failure to object to an "omission" from the charge, but that is not clear. Finally, there is nothing in Rule 52(b) that tells us that the failure of the trial court to withdraw the particular specification *without request* is "plain error."

III

We must also consider the matter in practical terms, not only from the point of view of the particular defendant, but also in consideration of the requirements of the criminal justice process. Rule 7(c)(1) provides that "[i]t may be alleged in a single count that . . . he [the defendant] committed it [the offense] by one or more specified means." The government treats the separate incidents of "the footnote" and the "nine-months statement" as specified means for committing the single crime. See original opinion, slip op. at 5167-69. And no one doubts that for pleading purposes the prosecution is right.

The government has argued from this that if our original ruling stands, it would compel the government in any false statement case, simply out of caution, to allege each incident constituting the "means" of committing the offense in a *separate count* or risk the reversal of a conviction based on afterthoughts on appellate review. We believe that this might be the better practice in cases like this where the incident charged as in violation of a statute are discrete. On the other hand, when that is not done, appellate review is not generally available when the particular insufficiency has not in some way been called to the attention of the trial judge. We do not believe that *Yates, supra,* in spite of its broad language, dictates a contrary result. Cf. *Turner* v. *United States,* 396 U.S. 398, 420 & n. 42 (1970).

What prompts our present consideration of Scansaroli's petition for rehearing is his argument that he did make it sufficiently clear to the trial judge that he wanted a judgment of acquittal or some equivalent on the "nine-months earnings statement" specification. On reconsideration, we agree that the arguments of counsel for Scansaroli with respect to the sufficiency of the evidence, his motion to strike the evidence relating to the Eastern commitment (an essential part of the "nine-months earnings statement" specification) and the *co-defendant's* specific motion to withdraw the specification on the nine-months earnings statement make this a close question.[5] Cf. *United States* v. *Lefkowitz,* 284 F.2d 310, 313 n.1 (2 Cir. 1960). As the Supreme Court has recently intimated in *Anderson* v. *United States,* 417 U.S. 211, 223 n.12 (1974), we may, in our discretion, consider a "sufficiency-of-the-evidence claim" even though the question arose below "only with respect to the admissibility of [certain] testimony." While *Anderson* also involved the question of whether the particular statute was *unconstitutionally* vague, and all the cases cited by Mr. Justice Marshall

5 We recognize that we cannot find fault with the distinguished District Judge, Harold Tyler, for not recognizing the various motions as a single request. We treat them, however, as sufficient to permit review in the interests of justice.

involved similar *constitutional* questions, we have concluded that we have sufficient discretion to adopt the reasoning in *Anderson* on this appeal.

Accordingly, we do not purport to lay down a firm rule to govern the precise action required below for appealability where a single count contains more than one specification. Indeed, we could hardly do so without the empanneling of an *en banc* court. We decide simply, on further consideration, that appellant in this case did enough below to satisfy the spirit of the *Mascuch-Goldstein* rule. We accordingly withdraw our opinion on the government's petition and reinstate our original opinion as to Scansaroli in all respects. Cf. *United States* v. *Love*, 472 F.2d 490, 496 (5 Cir. 1973).